IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2408 OF 1994

Tata Memorial Hospital (Tata
Memorial Centre) .. Petitioner

versus

Shashikant Shrikrishna Sompurkar
& Anr. .. Respondents

...

Mrs.Meena H. Doshi for the petitioner.

Mr.I.A. Saiyed for the respondent no.1.

CORAM : B.H. MARLAPALLE,J

DATED : 26th August 2005.

ORAL JUDGEMENT :-

1. This petition impugnes the judgement and order dated 29th April 1994 passed by the learned Member, Industrial Tribunal at Mumbai dismissing the application (IT) 53 of 1982 filed under section 33(2)(b) of the Industrial Disputes Act 1947 (for short 'the I.D. Act') in Reference (IT) 298/1981.

The petitioner hospital is run by Tata Memorial Centre which is a trust registered under the Bombay Public Trusts Act. The respondent employee was initially appointed vide the appointment order dated 10th June 1971 in the post of "Upper Division Clerk" and by an order dated 3rd September 1980, he came to be transferred to the library from the medicine department as clerk cum typist. It appears that on or about 23rd January 1981, he was issued a charge-sheet and aggrieved by the same he had approached the Industrial Court at Mumbai by filing a complaint of unfair labour practice. The said complaint came to be disposed as withdrawn as the employer made a statement before the Industrial Court that the charge-sheet would not be acted upon and a fresh charge-sheet setting out the details of misconduct would be issued. On 3rd September 1981, he was issued a memorandum alleging that he had refused to do the following work in the month of August 1981 and continued to do so till that day.

1) To write book number on spines of books;

2) To type a list of duplicate journals;

3) To issue/receive back library publications;

4) To enter (write) bound periodicals in the register when non-else was there to do the work,

5) The get books/journals placed back with the help of a boy when all other library staff was on leave and there was no place for readers to sit;

6) To wait till 8 p.m. when Mr.Sawant was on leave;

7) To help readers in finding out library publications;

8) To write titles of written off books in withdrawal register;

9) To type and to send letters in connection with "bibliography on cancer";

10 To note the contents of the office circular regarding ’coming of office in time’;

11) To direct outside readers to Librarian for

checking their identity cards, introductory notes etc;

As explanation was called within 7 days which he did on 9th September 1981 and refuted the allegations. The charge-sheet dated 5th October 1981 in furtherance of the memorandum dated 3rd September 1981 was issued levelling the acts of misconduct as set out in the said memorandum. He was informed that those acts on his part constituted the following misconduct :

a) gross neglect of work;

b) wilful disobedience of a lawful and reasonable order of a superior; and

c) commission of any act subversive of discipline.

2. A e departmental enquiry was instituted and Mr.George was appointed as the Enquiry Officer. The charge-sheet was replied by the employee on 12th October 1981. The Enquiry Officer submitted his findings on 7th January 1982 and a show cause notice

was issued to the respondent employee on 12th February 1982 calling upon him to show cause to to why his services should not be terminated. The employee submitted his reply on 22nd February 1982 and finally the order of dismissal was passed on 12th May 1982. As Reference (IT) 289 of 1981 was pending before the Industrial Tribunal, an application for approval of the dismissal order was submitted by the employer before the Industrial Tribunal in the said reference as required u/s.33(2)(b) of the I.D. Act.

3. The said application came to be registered as application (IT) 53 of 1982 which was opposed by the employe by filing written statement. By an order dated 6th April 1984, the Tribunal held that the enquiry conducted against the employee was defective and therefore, it was set aside. The Industrial Tribunal called upon the employer to adduce evidence to prove the charges of misconduct as levelled against the employee. The employer examined two witnesses viz. Shri M.N. Manohar, Librarian and Mrs. Chaya V. Tirodkar, Jr. Librarian. The respondent employee examined himself. By taking into consideration the evidence adduced by the parties and the arguments advanced by them, the approval

application was allowed by the Industrial Tribunal on 28th April 1989. However, this order of approval came to be challenged by the respondent employee in Writ Petition no.2271 of 1989 which was allowed on 15th July 1993 by relying upon an earlier decision in the case of Ganesh Rajan Sarvai vs. Bennett Coleman & Co. reported in 1988(1) CLR, 203 and approval application was remanded in terms of the following directions by this Court;

> a) The impugned award dt.28.4.1989 is set aside and the matter is remitted back to the Industrial Tribunal, Maharashtra, Bombay with the direction to decide the said Application (IT) No. 53 of 1982 on the basis of final adjudication as laid down in the judgement of this Court in Ganesh Rajan's case (supra)
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> b) Since evidence has been recorded, as stated hereinabove, by the Industrial Tribunal, the Industrial Tribunal is directed to decide the matter within three months from today.

c) It is made clear that on remand when the matter is being decided fully, all contentions in law as well as in facts are kept expressly open and both the parties are at liberty to advance such contentions as may be advised. It is further clarified that all questions advanced by the Petitioner as well as respondent no.1 even in the present Writ Petition as also in the affidavit in reply thereto are kept open.

4. On remand, parties were heard and by the impugned order dated 29th April 1994, the application was dismissed by directing the employer to reinstate the employee in service with 50% back wages from the date of dismissal till the date of his reinstatement. While admitting the petition, this Court by its order dated 28th June 1994 declined the prayer for stay to the order of reinstatement but stayed the order directing payment of back wages subject to depositing the entire amount with the registry of this Court. It is now

stated across the bar that the respondent employee has been in service since then and is due to retire on 30th September 2005.

5. Mrs.Doshi, the learned counsel for the petitioner submitted that the impugned order is in excess of jurisdiction and the Tribunal has treated the approval application u/s.33(2)(b) of the I.D. Act as a reference made u/s.10 and adjudicated the application as if by exercising the powers u/s.11-A of the said Act. As per her, the charges levelled against the employee were proved prima facie and the application did not suffer form any procedural defects. After the domestic enquiry was held to be defective, the parties adduced evidence before the Industrial Tribunal and therefore, the issue of legality of the enquiry did not arise for consideration. On remand, the employer by examining two witnesses duly proved the acts of misconduct as levelled and therefore, the approval application was required to be allowed. She further submitted that the charges levelled against the employee were not vague and the Industrial Tribunal fell in manifest errors in holding that the charges were not proved.

6. Mr. Saiyed, the learned counsel for the respondent employee while supporting the impugned order rejecting approval has contended that neither the memorandum nor the charge-sheet set out the details of the charges like date, time, department and all the allied events on all the days of August 1981 until 3rd September 1981. He has referred to the depositions of both the witnesses examined by the petitioner and submitted that the said evidence did not support,even a prima facie, to hold that the charges levelled against the employee were proved. As per Mr.Saiyed, the employee was victimised and the employer was guilty of unfair labour practice by punishing the employee, while imposing the punishment of dismissal from service. The thrust of arguments has been that the employee was appointed as Upper Division Clerk and he was transferred to perform the work of a typist for a substantial period of time on day to day basis and in any case, there is no evidence to show that the employee ever refused to do the duties as alleged in the memorandum dated 3.9.1981.

7. On the basis of these rival contentions, it is necessary to consider whether the approval

application was required to be allowed. In the case of M.D. Tamil Nadu State Transport Corporation Vs. Neethivilangan Kumbakonam reported in AIR 2001 SC 2309, after referring to the three Judge Bench decision in the case of Punjab Beverage Pvt.Ltd. vs. Suresh Chand (AIR 1978 SC 995), the scope of section 33(2)(b) of the I.D. Act was explained in the following words:-

> "From the conspectus of the view taken in the decisions referred to above the position is manifest that while the employer has the discretion to initiate a departmental inquiry and pass an order of dismissal or discharge against the workman the order remains in an inchoate state till the employer obtains orders of approval from the Tribunal. By passing the order of discharge or dismissal de facto relationship of employer and employee may be ended but not the de jure relationship for that could happen only when the Tribunal accords its approval. The relationship of employer and employee is not legally terminated till approval of discharge or dismissal is given by the Tribunal. In a case where the Tribunal refuses to accord approval to the action taken by the employer and rejects the petition filed Under section 33(2)(b) of the Act on merit the employer is bound to treat the employee as continuing in service and give him all the consequential benefits."

In the case of Ganesh (Supra) this Court held:

> "the settled law is that when no domestic enquiry is held and when evidence is adduced before the Industrial Tribunal or Labour Court, the matter is at large before such an authority on the basis of a full scale inquiry and the employer has not only to prove the misconduct alleged against the workmen but has also to satisfy the authority that in the facts and circumstances of the case the infliction of a certain kind of punishment on the workman was justified. The further settled law is that when an employer holds a domestic inquiry and takes an action of discharge of dismissal of a workmen and seeks approval or permission of the Industrial Tribunal or Labour Court u/s.33(2)(b) of the Act, all that the authority has to find out is whether the proper domestic inquiry was held, that the action of the employer was not malafide and that he had not indulged in an act of victimisation or unfair labour practice and if the conditions laid down in the proviso to section u/s.33(2)(b) of the Act are satisfied, the authority may approve the action of discharge or dismissal of the workman or grant permission to do so."

8. In the instant case in the earlier round in Writ Petition no.2271 of 1989 while remanding the approval application to the Industrial Tribunal, this Court had directed it to consider decide the application afresh as per the law laid down in Ganesh’s case (Supra). The Industrial Tribunal

therefore analysed the evidence to find out whether the charges levelled against the employee were proved, whether the order of dismissal amounted to victimisation/unfair labour practice and whether the punishment was shockingly disproportionate if the charges were proved. The arguments of Mrs. Doshi that the Tribunal fell in error in enlarging the scope of its powers u/s.33(2)(b) of the Act, are therefore, unsustainable.

9. The Constitution Bench in the case of Jaipur Zilla Sahakari Bhoomi Vikas Bank Vs. Shri Ram Gopal Sharma & ors. reported in AIR 2002 SC 643 stated thus:

> "Where an application is made under Section 33(2)(b) Proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bonafide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not etc. If the authority refused to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b)

> dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision."

10. Let us now consider the evidence adduced before the Tribunal by the respective parties and more particularly the employer who was required to prove the charges levelled against the employee. It has come in the evidence of the witnesses of the employer that the employee was transferred in the place of one Mr.Naik who was a typist. The evidence fails to prove that the duty list dated 4th September 1980 was served on the employee. As per the evidence of Ms.Tirodkar, Mr.Sawant was a technician and the persons performing such duties were required to possess professional/ technical qualifications. In her examination in chief, she had stated that since 4th September 1980, Shri Sompurkar refused to do the typing work. IN her cross examination, she admitted that Mr.Sompurkar was given work of typing in the month of August 1981 but he could not complete all the work assigned to him. This evidence falsified the charge that the employer refused to do the typing

work and he continued to refuse the same work till the memorandum dt.3.9.1981 or the charge-sheet dated 5th October 1981 was issued. The instances of refusal of work or complaints related to such duties assigned to the employee and disclosed by the first witness Mr.Manohar before the Tribunal do not pertain to the period from 1st August 1981 to 3rd September 1981. In his examination in chief, Mr.Manohar stated that in the months of July and August 1981 on account of the absence of other colleagues, only himself and Mr.Sompurkar used to work in the office and even at that time, the approach of Mr.Sompurkar was non cooperative. He further states that he had asked Mr.Sompurkar to sent the outside readers to take their identity cards but he did not do so. NO dates or no instances were specified of such refusal and in her deposition Ms.Tirodkar admitted that she did not receive any complaint from any readers regarding the work of Mr.Sompurkar. If it was the charge that the employee refused to do the particular work, it is necessary to mention the date, time, nature of the work that was refused. The memorandum and charge-sheet stated that in the month of August 1981 and till date of the issuance

of the memorandum, he refused to do the duties mentioned in the memorandum but the evidence that was placed on record through both the witnesses failed to give any substantial incidence during this period of August 1981 and till 3rd September 1981.

11. It was also alleged that he used to read his personal books during the working hours and inspite of the instructions not to do so, he did not improve. Ms.Tirodkar clarified the term "his books" and stated that the employee was in the habit of reading Marathi magazines, books necessary for preparing for tuitions and law books as he was studying for law. No specific instance was given that on a particular day and time, he was found reading such books and when he was warned by Mr.Manohar, he continued to do so. The charge-sheet alleged three acts of misconduct viz. i) gross neglect of work (ii)wilful disobedience of a lawful and reasonable order of a superior; and (iii)commission of any act subversive of discipline. The Tribunal is right in its finding that there was no evidence even to hold prima facie the employee guilty of any of these charges and the

evidence recorded by the employee before the Tribunal fell short of making out even a reasonable case of pre-ponderance to prove these charges. Under the circumstances, the impugned order does not call for any interference while exercising the powers of superintendence under Art.227 of the Constitution.

12. Having regards to the facts that the employee continued in service and he is due to retire on 30th September 2005, the only question that remains is about the back wages. The Tribunal has granted 50% back wages from the date of dismissal till the date of his reinstatement. As per Mrs.Doshi, the learned counsel for the petitioner, the employee was working with the Jamnalal Bajaj Institute of Management Studies under the University of Mumbai and he was gainfully employed. The evidence supports this contention and the letter dated 25th November 1987 addressed by the Registrar of the University of Mumbai to the petitioner states that the respondent employee worked as a clerk on purely temporary basis form 1st June 1983 to 11th July 1987. His salary certificate issued on 27th January 1987 by the

Asstt. Registrar, Jamnalal Bajaj Institute of Management Studies states that the respondent employee was paid Rs.1,035/- as his total emoluments in the month of December 1986. By referring to this evidence which is not disputed by the employee even in the affidavit in reply, he has filed in this petition, Mrs.Doshi submitted that the order of back wages granted by the Tribunal is untenable and is required to be quashed and set aside.

13. The legal position that has been referred to hereinabove states that the relationship of employer and employee comes to an end only on the approval application having been allowed by the Tribunal and if such an approval is not granted it will have to be deemed that the order of discharge or dismissal had never been passed. The Constitution Bench in the case of Jaipur Z.S.B.V. Bank (Supra) held that the consequence of non approval or rejection of the application for approval is that the employee is deemed to have continued in service entitling him to all the benefits at this stage. In the instant case, the dismissal order was passed on 12th May 1982 and the

approval application was rejected on 6th May 1994. Consequent to the order passed by this Court on 28.6.1994, the employee was reinstated. Thus, as per the said legal position, he would be entitled for full wages and all consequential benefits from 12th May 1982 till the date he was reinstated. But it has been proved by the employer that the employee was gainfully employed from 1.6.1983 to 10.7.1987 and it cannot be accepted that he was not receiving the salary which he ought to have received had he continued with the petitioner hospital during this period. Therefore, he shall not be entitled to claim any salary for the period from 1.6.1983 to 11.7.1987. The respondent employee has not challenged the order to the extent of granting only 50% of the back wages by the Tribunal. The petitioner is a hospital run by the public trust and taking into consideration all other circumstances and more particularly that after his reinstatement he has been granted promotion as well, the relief of 50% back wages need not be disturbed because out of the 12 years of unemployment, he was gainfully employed only for about 4 years and back wages at 50% would cover the period of about six years.

14. In the premises, this petition fails and the same is hereby dismissed under Art.227 of the Constitution. Rule discharged with no order as to costs.

15. Mrs.Doshi makes an oral application to stay this order for a period of six weeks. The application is hereby rejected.

B.H. MARLAPALLE, J